No. 15,873

United States Court of Appeals

For the Ninth Circuit

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE and HARLAN L. MCFARLAND,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of California, Northern Division.

Honorable Gilbert H. Jertberg, Judge.

APPELLANTS' CLOSING BRIEF.

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POINT 1.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDING OF FRAUD.

In Appellants' Opening Brief the point was made that the evidence was insufficient to support a finding of trick or device for the reason that no veteran made a material misrepresentation in securing his priority certificate. Appellee has failed to answer this contention.

The Government advances the theory that there was a misrepresentation in respect to the enterprise.

It argues (Appellee's Brief, p. 3) "Each of these applications described an established business." The record does not bear out this assertion. Dailey described his enterprise as "wholesaler-retailer" [127]; Schwartze as "truck rental" and "It is already established? Yes", "If yes, are you operating it? No"; and, further, "I planned to start with the surplus units I obtained."; "Size of enterprise? ....." [207]. McFarland stated "auto dealer" [219] on the second application, and "truck sales and service" on the first [227]. In no case was there a description of any business given. Had there been a misrepresentation as to the nature, size, character or extent of the undertaking there would be a basis to argue that there was a trick or device. The fact of the matter is that during the period involved in these transactions the policy of the War Assets Board was not to inquire into the nature, extent, character or size of any particular undertaking. This policy was not adopted until November of 1946, long after all of the applications were signed and after all of the purchases were made.

Dailey, McFarland and Schwartze were in a literal sense automobile dealers, because they had *bona fide* qualified to engage in such business under the laws of California, which required a Dealer's license. The transactions in question, without exception, are the result of engaging in the business of automobile dealing. The term does not imply an undertaking of any particular size or specific character. The re-

marks with respect to the nature of the business of the veterans contained in the certificates are not false in any material respect. The Court below fell into the error of assuming that the enterprise of being an automobile dealer required some undisclosed degree of substance. This would be true if, and only if, an inquiry was made in that respect and a concealment of the character or status of the enterprise was given in response.

The important point is that there was a full disclosure by each veteran of the intended purpose of the purchase. In McFarland and Dailey's case there was a full disclosure of an intent to resell. In the case of Schwartze there was a disclosure of an intent to form a truck rental service, which plan was frustrated.

That the Court below fell into this error is demonstrated by the statement: "from all of the evidence that as far as any enterprise of these men, it was purely synthetic" [443]. That is the entire basis of the Court's decision. The Court did not find that there was a misrepresentation by which any advantage of the Government was taken. On the contrary, the Court concluded: "Now, I don't say at all that there was anything sinister or evil in the arrangement that had been made. I think that Mr. Hougham was anxious to give some help to those veterans. I don't feel that he had figured out in his mind, in detail, 'I will work it this way and in that way get around the law'. I don't know how familiar he was

with the regulations, but, of course, lack of knowledge of the regulations, under the law, is not a defense in the action." [443-444][1]

It was pointed out in the Opening Brief that there was no regulation in effect during the period in question prohibiting a resale by the veteran to any person whom he chose, or from buying surplus property from the Government with borrowed money. The underlying defect in the Court's decision on the merits is failure to clearly distinguish, in its own mind, between the present case and the type of case, both civil and criminal, known as "The Veteran Front Case". In those cases veterans have purchased certain kinds of scarce articles, such as trucks, which War Assets had set aside for the sole use of veterans. It attained its end by forbidding resale and requiring the veteran to sign a statement to the effect that it was for his own use only and not for the use of any other merchant or undisclosed partner or principal. Typical of the veteran front cases are *Rex Trailer v. U.S.*, 350 U.S. 148; *Daniel v. U.S.*, 234 F. 2d 102, and *U.S. v. Comstock Mining Extension Co.*, 214 F. 2d 400. Those cases are distinguished from

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[1] § 8302.9(b), page 2070, U.S. Code Congressional Service, 79th Congress, 2nd Session, provides:

"(b) *Except in the case of* transfers to Reconstruction Finance Corporation as successor to Smaller War Plants Corporation for resale under section 18(e) of the Surplus Property Act of 1944, and *disposals to veterans of property to be resold with or without processing or fabrication in the regular course of business,* transfers or disposals to priority claimants shall be for their own use only and not for transfer or disposition by them to others, and disposal agencies may require priority claimants so to certify." (Emphasis added.)

the case at bar in that there, deliberate false misrepresentations that the article was purchased for personal use were made, and immediately after acquisition the articles were transferred to non-veterans, with the result that articles in short supply, limited to veterans for personal use, were illegally siphoned off into prohibited channels. The articles here involved were not sold to the veterans under conditions restricting their use to personal use. They were sold to the veterans after a complete disclosure that the articles were intended for resale. They were not considered articles in "short supply" at the time of these transactions, but were articles specifically offered for sale by the War Assets Administration, knowing that they were intended for resale. There was no sinister result achieved by the operations of these defendants. The only result achieved was that articles of merchandise were offered for sale to veterans for unrestricted resale, and these veterans, in a legal manner, acquired funds for the purchases. At this point the Government had achieved everything bargained for, had lost all title to the merchandise upon receipt of the price, and had no further legitimate interest in the merchandise or any further right to restrict its use or to designate the channels of trade in which it could operate. Assuming that the War Assets Administration could have restricted the intended use at the time of the sale, the fact is that here it did not, and its reason for not doing so was not due to any trick, device or concealment of any kind by any of these defendants. If any such restriction on the right of resale was intended it could

easily and distinctly have been written into the regulations and certificates in such a way as to clearly draw the line between lawful and unlawful conduct and advise the veteran how to avoid an unlawful act. As the Supreme Court said in *Krause & Bros. v. U.S.,* 327 U.S. 614, 621, 90 L. ed. 894, 898, involving an alleged evasion of price regulations:

> ". . .; *they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation.* See *United States v. Wiltberger,* 5 Wheat. (U.S.) 76, 94-95, 5 L. ed. 37, 42, 43. *The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.*"

This Court has overlooked as applicable to this case the fundamental rule of law which prescribes that there can be no fraud or deceit unless the representee is deceived. *Ming v. Woolfolk,* 116 U.S. 599, 29 L. Ed. 740; *Stratton Independent v. Dings,* 126 F. 968, 977. Under the facts proven there is no occasion to indulge in the sinister fiction that these defendants were mere "messenger boys" of Hougham.

In *U.S. v. California Midway Oil Company,* 259 F. 343, where the Government challenged oil locations on the ground that the entries had been made by dummies the Court states:

> "If the circumstances proven are just as consistent with honesty and good faith as with a

> fraudulent intent, the inference of fraud is not warranted. In short, when two inferences can be drawn from proven facts, one in favor of fair dealing and good faith and the other of corrupt motive, it is the duty of the trier of fact to draw the inference favorable to good faith and fair dealing. In re: Hawks, 204 Fed. 316; Ryder v. Bamberger, 172 Cal. 797, 158 Pac. 753."

There never had been a "veteran front" case involving a certificate issued authorizing the veteran to resell prior to *Bernstein v. U.S.,* appended to the Government's Appeal Brief. That case is distinguishable upon the facts in several important particulars. First, in respect to the policy of the War Assets Administration, in the instant case the applications were made and signed at a time when the policy of the Board was not concerned with the details of or the nature or extent of the enterprise. The transactions here involved took place between March and September, 1946, and the applications themselves, made in March and July, 1946, show that no information was inquired of the veteran in respect to the nature, character, extent or size of the enterprise. In this regard all of the applications are blank.

In November of 1946 the policy of the War Assets Administration changed and more detailed information was requested of veterans proposing to acquire property for resale. This was pointed out in Appellants' Opening Brief and is forcefully shown in the Bernstein Veteran's Application, which was not prepared until November 19, 1946.

There Bensik, the veteran, was required to certify: "That I am or have made necessary arrangements to become an established dealer, jobber or distributor of the kind that customarily take into their possession, and have full control for the purpose of reselling, property of the kind covered by this order; that I am not a broker and will not use the property ordered to operate as a broker whose business it is to bring buyers and sellers together and who does not normally take title to or possession of property and is generally an agent of one of the parties to a sale; that I will not indulge in 'drop sale' disposal of the property ordered. I further certify that I now have or will make definite arrangements for a suitable office and operating and storage space, and that I am sufficiently financed to enable me to conduct my business of the kind above stated."[2]

After such a certification Bensik was charged with a false representation that he was not the broker or agent of Bernstein.

No certification was required of these defendants of anything like that character. Only in the case of Owen Dailey was there any certification in any way approaching the Bensik certification, and he certified "I am not purchasing the property described herein for the benefit of any other enterprise, dealer, broker, merchant or other undisclosed partner or principal." This certification was true and not in any way false

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[2]Taken from Appellant's and Cross-Appellee's Brief, Bernstein Appendix, Bernstein v. U.S., No. 5704, U.S. Court of Appeals, 10th Circuit.

because Dailey himself benefited and he did not certify that no other person would not also ultimately benefit. The question of how far the Government may control property after authorizing it to be resold is squarely raised in the *Bernstein* case by the change in the policy of the War Assets Administration. The certification required by the War Assets Administration in the *Bernstein* case was not authorized by any provision of the War Surpus Act or any regulation issued pursuant thereto, and its right to require a dealer to restrict his trade to certain classes of customers by excluding others is subject to challenge as being void for the reason that it is contrary to the provisions of the War Surplus Property Act and the regulations.

Peo. v. Finn Twins, 127 Fed. Supp. 158.

This feature of the *Bernstein* case is not presented in this record, for it was not a part of the policy of the War Assets Administration at the time of these transactions, and these veterans were not required to certify that they would not resell to brokers, etc. This distinction purges the conduct here relied upon by the Government as a badge of fraud. (Respondent's Brief, pages 12 and 13.)

The purchase of large amounts of surplus property by impecunious veterans is of no consequence if no false representation was made. Similarly, it is of no consequence if the purchase was made by money supplied by Hougham, if the transaction was not connected with a false representation. Also, Hougham's failure to charge interest and the informality of the

records of the loans loses insignificance as does the price received by the veteran. These circumstances, coupled with a false statement, we would admit to be ample evidence of a badge of fraud. Standing alone, however, there is nothing wrong or improper about any act in itself.

We are mindful of the rule that this Court will not ordinarily reverse unless the finding of the Trial Court is "clearly erroneous," but we submit that this ruling is "clearly erroneous" and that the District Court's Findings will leave this Court with a "definite and firm conviction that a mistake has been committed."

POINT 2.

THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

The Government suggests that the case of *Rex Trailer Co. v. United States,* 350 U.S. 149, has a bearing on this problem. This contention is unsound. The *Rex Trailer* case has no bearing whatsoever upon the question of whether the statute of limitations applies to a case of this character. There the question was whether or not the provisions of Section 26 (b) (1) were afforded a criminal penalty or a civil penalty. The Court states:

> "Petitioner's sole contention is that §26 (b) (1) provides a criminal penalty and, having once been convicted and fined for the transactions in question, it cannot again be subjected to punishment. The only question for our decision, then,

> is whether §26 (b) (1) is civil or penal, for 'Congress may impose both a criminal and civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.' We conclude that the recovery here is civil in nature."

It relies upon *Marcus v. Hess,* 317 U.S. 537, a False Claims case containing a provision for $2,000.00 plus double damages, which clearly recognizes the rule that an action may be civil in nature and yet enforce a "civil fine, penalty or forfeiture, pecuniary or otherwise." In that case the precise question involved was "Is the action now before us, consisting of double damages and the $2,000.00 forfeiture, criminal or civil? It is enough for present purposes if we conclude that the instant proceedings are remedial and impose a civil sanction."

And, further:

> "Quite aside from its interest as preserver of the peace, the government when spending its money has the same interest in protecting itself from fraudulent practices as it has in protecting any citizen from frauds which may be practiced upon him. 'The powers of the United States as a sovereign, dealing with offenders against their laws, must not be confounded with their rights as a body politic. It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection.' "

And:

> "It is argued that the $2,000 'forfeit and pay' provision is 'criminal' rather than 'civil' even if the double damage feature is not. The words 'forfeit and pay' relate alike to the $2,000 sum and the double damages. The use of the word 'forfeit' in conjunction with the word 'pay' does not force the conclusion that the provision is criminal. No one doubts that Congress could have accomplished the same result by authorizing 'double' or 'quadruple' or 'punitive' damages or a lump sum payment for attorney's fees, or by definition of the elements of 'actual damages.' Special consequences cannot be drawn from the use of the word 'forfeit.' While this might under other circumstances be an appropriate word to suggest a fine upon the failure to pay which an individual might be imprisoned, no such punishment is provided here upon default in payment. The words 'forfeit and pay' are wholly consistent with a civil action for damages."

By relying upon *Marcus v. Hess* as its authority, the *Rex Trailer* case in fact aligns itself with the reasoning of the majority of the Circuits relied upon by these defendants.

Furthermore, it should not be overlooked that the Government does not rely upon the *Rex Trailer* case itself but cites a "footnote" as its authority. The footnote is nothing more than a casual observation. It is not a part of the opinion and is an inaccurate expression of the fact in stating "The Sixth Circuit held it to be penal in United States v. Witherspoon, 211 F. 2d 858." The precise statement is that 28

U.S.C.A. §2462 applies to a War Surplus act involving a $2,000.00 civil penalty for each act. There the Court stated:

> "We are of the opinion that the action is one for penalties. A statute is penal where the purpose is to punish an offense against the public justice, as distinguished from an action affording a private remedy for injury by a wrongful act; the word, 'penalty,' strictly and primarily denotes punishment, imposed and enforced by the state, for an offense against its laws. It also *commonly is used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered.*"

And, further:

> "'The term "penalty" is commonly used in the sense of an extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged as distinguished from compensation for the loss suffered by the injured person.'"

Further:

> "The exaction of the arbitrary sum of $2,000 for each offense of obtaining, by fraud, surplus property, without regard to its value, is a provision for a penalty."

The case of *United States v. Doman,* decided by the Third Circuit and reported in the Appendix to the Government's Brief, is based upon faulty reasoning throughout. First, it uses the "boot strap" argument and cites the Memorandum Opinion of Judge Jertberg as its authority. Thus this Court is asked

to bow to the will of the Trial Court. The *Rex Trailer* case is improperly relied upon, for it is quoted as authority for a proposition which was never before it and which it expressly left open.

It relies upon *Marcus v. Hess,* which also leaves open the specific point here involved, and which, as previously demonstrated, recognizes that there is such a thing commonly known to the law as "civil penalties".

Its premise that §26 (b), containing three subdivisions, should be construed *in pari materia* adds no substance to its position. Of course they are compensatory. All three subdivisions are compensatory, but even though compensatory they are in the nature of a fine, penalty or forfeiture.

The reasoning of the *Weaver* case and all others adopting the minority view is faulty in that it deliberately closes its eyes, like an ostrich with its head in the sand, to the plain meaning of the language of the Act, and deliberately distorts the same, while the reasoning of the majority of Circuits is in line with sound legal reasoning and a reasonable construction of the language of the statute.

CONCLUSION.

We sincerely believe that we have demonstrated conclusively to this Court that the finding of fraud by the Trial Court is clearly erroneous. We note that the Government admits a complete failure of

the Trial Court to find upon a material issue, and we earnestly request this Court, if necessary, to align itself with the better reasoned Circuits in respect to the Statute of Limitations.

Dated, Bakersfield, California,
July 29, 1958.

Respectfully submitted,
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